89-1131

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1989

CHRISTINA FANG-HUI LIAO,
Petitioner,

v.

CHARLES DEAN, JR.;
TENNESSEE VALLEY AUTHORITY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress create a judicial means of enforcing the affirmative action obligations of the federal government in the federal district courts when it enacted Section 717 of Title VII of the Civil Rights Act of 1964 and incorporated Executive Order 11478 therein?

2. Is Section 717 of the Act violated where: (a) the plaintiff was an intended beneficiary of the affirmative action obligations of that section; (b) the defendant deliberately violated the obligation by retaining a less senior white male who was not better qualified than the plaintiff; (c) in the absence of such violation the plaintiff would have been retained; and (d) the defendant has not articulated any rationale for not retaining the plaintiff which overrides the affirmative action obligations imposed by Section 717 and Executive Order 11478 or which explains the violation of such obligations on non-discriminatory grounds?

3. After holding that the trial court applied erroneous legal principles to the facts of this case, did the appellate court err by rendering a decision on the basis of its own credibility determinations rather than remanding to the trial court for further factfinding in light of new legal principles established by the appellate court as required by this Court's instructions in *Pullman Standard v. Swint*, 456 U.S. 273, 292-293 (1982)?

LIST OF PARTIES

The parties to this case in the Court of Appeals were as follows:

Christina Fang-Hui Liao
Charles H. Dean, Jr.
Tennessee Valley Authority

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BEST AVA

OPINIONS BELOW

The decisions of the United States District Court for the Northern District of Alabama and the Court of Appeals for the Eleventh Circuit at issue are reported as *Liao v. Charles H. Dean, Tennessee Valley Authority*, 658 F. Supp. 1554 (N.D. Ala. 1987), *reversed*, 867 F.2d 1366 (11th Cir.), *rehearing denied*, 888 F.2d 1398 (11th Cir. 1989). The courts' opinions are reproduced in the Appendix.

JURISDICTION

The judgment sought to be reviewed was dated and entered on September 29, 1989. (App. 29-30). This petition for writ of certiorari is being filed within the time extended by this Court after entry of the Eleventh Circuit's judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

The statute involved in this case is Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-16, 42 U.S.C. Section 2000e-5(f) (3), and Executive Order #11478 incorporated herein. The statute reads as follows:

> SECTION 717. (a) All personnel actions affecting employees or applicants for employment *** shall be made free from any discrimination based on race, color, religion, sex or national origin. (Added by P.L. 92-261, eff. March 24, 1972).
>
> (b) ***The Civil Service Commission shall —
>
> (1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment; ***
>
> The head of such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that

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an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to —

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program. ***

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717 (a) *** on a complaint of discrimination based on race, color, religion or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding executive orders, *** an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action of his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provision of section 706 (f) through (k), as applicable, shall govern civil actions brought hereunder. (Added by P.L. 92-261, eff. March 24, 1972).

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment

opportunity in the Federal Government. (Added by P.L. 92-621, eff. March 24, 1972).

Executive Order 11478 — Equal Employment Opportunity In The Federal Government

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

***

SECTION 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner, assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the

local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

***

STATEMENT OF THE CASE

This case presents the question of whether the federal government's unique affirmative action obligations set forth in Section 717 of Title VII of the Civil Rights Act of 1964 and Executive Order #11478 are mandatory and enforceable in the federal courts. Congress has said yes, as did the trial court, but the Court of Appeals said no. For this reason, the writ should be issued so as to restore the explicit Congressional intent set forth in Section 717 of the Act.

1. Proceedings In The District Court

The plaintiff is a citizen of the United States and employed as a Research Chemist with the National Fertilizer Development Center of the Tennessee Valley Authority. She brought suit under Title VII of the Civil Rights Act of 1964 alleging that she was treated discriminatorily because of her sex and race (Chinese) when she was paid less than white male chemists doing the same work and having the same or lesser education credentials and experience and when she was layed-off while those same men were retained to do work she was just as well qualified to perform.

The trial court found that the defendants violated Title VII by retaining a *less senior* white male in a layoff who was no better qualified than the plaintiff, thereby violating their affirmative action obligations under Section 717 of the Act. The trial court found that the retention of a less senior white male who was not better qualified than the plaintiff could not have been accomplished in the absence of a violation of the defendant's affirmative action plans and obligation. App. 6-7, 11, 13-14. The Court further found that "the choice to

discharge a qualified Asian woman while keeping a qualified white male with two years less service [was] a decision which further skewed an already admittedly badly imbalanced scientific workforce." App. 7. This was found to have been caused by an "adverse white male reaction to TVA's affirmative action program." App. 2.

The trial court rejected the defendant's articulated reason for its decision to retain the less senior white male and found that in light of the breached affirmative action obligation "there is no logical or fair way that TVA, or this court, can justify TVA's decision to terminate Dr. Liao while retaining Dr. Bock." The court added that because the breach of the affirmative action obligation caused the plaintiff's lay-off, there was "no need for this court to determine whether or not TVA's decision to terminate Dr. Liao was impermissibly or directly motivated by her race and/or sex." App. 14. In a supplemental opinion, however, the trial court made "unequivocal its finding both of intentional racial and of intentional sexual discrimination by defendants when Dr. Liao was terminated contrary to the mandate and purpose of the AAP promulgated by defendants." App. 15. The trial court added that "[n]ot only did Dr. Liao present the classic *prima facie* case under the so-called *Burdine* analysis . . . , but the allegedly legitimate non-discriminatory reason articulated by defendants is automatically and by definition 'pretextual' because it was in clear violation of the AAP and not justifiable in terms of any intervening or overriding principle of 'seniority'." App. 16.

2. Proceedings In The Court of Appeals

The Court of Appeals did not reverse any of the factual findings as "clearly erroneous," but instead held that the trial court applied an erroneous principle of law in holding that "an employer who violates a voluntarily adopted affirmative action plan automatically violates Title VII's prohibitions as well." App. 22. The trial court however, had not held that all violations of the affirmative action plan *automatically* violate Title VII, but instead held that *in this particular case* the refusal to follow the affirmative action obligations estab-

lished the pretextual character of the defendant's articulated reason for retaining the less senior white male in the layoff.

The trial court was careful in holding that if there were credible articulated reasons for not following the affirmative action plan, such as seniority or better qualifications, then the violation of the plan would not be a violation of Title VII or otherwise create liability. App. 14. Specificially, the trial court held that:

> This court does not mean to be understood as holding that there can never be a circumstance in which a person enjoying a preferred status under an AAP cannot be displaced or differentially treated in competition with another, substantially better qualified, non-protected employee. This court can easily conceive of a scenario where an affirmatively preferred person, according to the AAP, could be sufficiently inferior in qualificationis to a non-preferred person as to create an excuse for not strictly applying the AAP. But this is not the case. Dr. Liao is admittedly a good chemist. She was dedicated to her job. Her performance level was recognized as more than adequate by her superiors until the RIF appeared imminent. It was at that time that her alleged shortcomings were aired, for the purpose, whether covert or overt, of providing an escape from the AAP mandate.

App. 14.

The Court of Appeals ignored the foregoing and premised its reversal on the erroneous notion that the trial court's decision makes governmental employers "liable for a Title VII violation for every deviation" from a voluntary affirmative action plan. App. 25. As a principle of law, the Court of Appeals held that Title VII can be violated only when the violation of the affirmative action plan is caused by an independent racially discriminatory intent or has a discriminatory impact. Even in proving such matters, the Court held that "the failure to give a preference under such a plan *cannot be used* to support an allegation of discrimination in employment decisions." App. 26. (emphasis supplied).

The Court of Appeals also held that the trial court never reached the issue of disparate treatment, disparate impact or intentional discrimination because it had "equated a violation of the affirmative action plan with a violation of Title VII and thought it unnecessary to engage in an analysis of whether intentional discrimination had occurred." App. 27. Instead of remanding the case to the district court to allow such factual issues to be determined under "corrected" legal principles, however, the Court of Appeals rendered judgment in favor of the defendant, thereby preempting the plaintiff's right to have factual matters decided by the trial court.

The trial court had also expressly reserved other factual claims and issues, but the Court of Appeals ignored these altogether and looked solely at the plaintiff's layoff claim. App. 2. More specifically, the district court had held that:

> During her time of employment, Dr. Liao lodged written and verbal complaints with her supervisors alleging disparate treatment in several respects: (1) slow promotion and unfair differentiation in job classification; (2) lack of an exclusive laboratory and a laboratory assistant; (3) unfair performance evaluations (4) non-exposure to education seminars and advancement opportunities; and (5) ostracism. A good argument can be made that one or more of Dr. Liao's pre-termination complaints was valid; but the court finds it unnecessary to decide whether or not anything Dr. Liao complained of prior to her termination constituted an act motivated by sexual and/or racial discrimination, that is, except to the extent that her complaints may tend to reflect an adverse white male reaction to TVA's affirmative action program (AAP), which will be the primary subject of this opinion.

App. 1-2.

The Court of Appeals never addressed any of these claims or issues reached by the trial court, and did not remand them for consideration after reversing the layoff claim. The plaintiff was, therefore, denied her day in court on these other claims.

STATEMENT OF FACTS

The defendant instituted a reduction-in-force in January, 1982, which eliminated 50% of the women and minorities in the plaintiff's department, including two Ph.D.'s. (Tr. 103; A.R. 536-537). One of the two Ph.D.'s eliminated was black and the other one was the plaintiff (Tr. 103). The defendant retained Dr. Bock, who was two years less senior than the plaintiff. App. 2. The defendant also continued to hold a slot open for Ken Kelley as a research scientist while he was still away at school attempting to earn the Ph.D. which the plaintiff had already obtained. (A.R. 859, 182-184). The defendant admitted that the plaintiff's qualifications were not questioned in the reduction-in-force decision. (A.R. 545-547, 593-540; Tr. 76-77).

The defendant attempted to show that the selection of the plaintiff for layoff was based on the "objective" consideration that she was an SD-4 and her work was not as great a priority, but the district court rejected these contentions and found as a fact that the decision was nothing more than a "subjective" preference for Dr. Bock. App. 6-7. The defendant admitted, through Dr. Shields, that there was no policy which required the elimination of an SD-4 instead of an M-5. (Tr. 84-85). The trial court found that the plaintiff's and Bock's "work was substantially similar and their academic qualifications were virtually identical." App. 7. But Bock was paid substantially more than the plaintiff, even though they performed the same work and had equivalent qualifications. (Tr. 20-22, 29, 36, 11-12, 58, 116, 141; Pl. Exh. #11, pp. 16-19). There was also credible evidence from Dr. Edwards that the plaintiff was better qualified than Bock. (A.R. 839-840).

The trial court found as a fact that the plaintiff was a "good chemist," was "dedicated to her job" and "her performance level was recognized as more than adequate by her superiors." App. 13-14. The court specifically found that Bock was *not better qualified* than the plaintiff and that "[t]he only real distinction between them was that their supervisors liked Dr. Bock better than they liked Dr. Liao." App. 7. The trial court also found as a fact that "[h]er performance level was recognized as more than adequate by her superiors until

the RIF appeared imminent," at which time "her alleged shortcomings were aired, for the purpose, whether covert or overt, of providing an escape from the AAP mandate." App. 14.

The court further found that the reference to eliminating an S-4 instead of an M-5 was "a euphemistic way of deciding to terminate Dr. Liao," because "[t]he choice for termination was clearly between Dr. Liao and Dr. Bock, and not between job classifications." App. 6. The district court found that "fear of the AAP . . . pervaded the process" in choosing between Bock and Liao, and that the defendant had resorted to misrepresenting the plaintiff's performance "for the purpose . . . of providing an escape from the AAP mandate." App. 6-7, 13-14. That mandate was understood by the defendant's decisionmakers, and they knew of the explicit instructions to take the affirmative action requirements into consideration in deciding whom to terminate. (Tr. 82-84; A.R. 835, 837). The district court found, however, that "[t]o fire Dr. Liao and to keep Dr. Bock, who was hired two years after Dr. Liao, can hardly be said to enhance TVA's future prospects for recruiting technically qualified females and racial minorities." App. 13. Because of the affirmative action obligation of the defendant, the district court ultimately found that "there is no logical or fair way that TVA, or this court, can justify TVA's decision to terminate Dr. Liao while retaining Dr. Bock." App. 14.

REASONS FOR GRANTING THE WRIT

The court below has left no room for enforcement of the unique affirmative action obligations of the federal government which Congress imposed in Section 717 of Title VII of the Civil Rights Act of 1964 and which the President imposed in Executive Order 11478. The trial court, on the other hand, allowed such enforcement in the limited circumstance where the plaintiff was an intended beneficiary of such obligation, was just as well qualified and more senior than the white male, and would have been selected or retained in the absence of the defendant's refusal to comply with the affirmative action obligations mandated by Title VII and the

Executive Order incorporated therein. A cause of action for enforcement of such obligations was expressly created by Congress in Section 717(c) and (d) of the Act, but the Court of Appeals refused to apply it because of the erroneous view that the federal government's affirmative action obligations are merely permissive, like that of private employers, rather than mandatory.

While the Court of Appeals would permit challenge of racially disparate treatment or impact, it refused to permit the violation of an affirmative action obligation to be used even as evidence of such discrimination, holding that "the failure to give a preference under such a plan cannot be used to support an allegation of discrimination in employment decisions." App. 26. This creates error of exceptional public importance, where, as here, the plaintiff was just as well qualified and more senior than the white male and the refusal to apply the affirmative action plan is found by the trial court to be pretextual and unworthy of credence. The Court of Appeals, however, does not permit a violation of an affirmative action obligation to be used as evidence of a violation of the Act even in this restricted manner.

Exceptional error was also created by the Eleventh Circuit's refusal to allow the trial court to reconsider the facts in light of the "correct" legal principles enunciated in the appeal. It is well established that the trial court should be allowed to reconsider its findings of fact whenever the original findings are reversed because of an erroneous view of the law rather than because they were "clearly erroneous."

THE COURT BELOW HAS RENDERED THE FEDERAL GOVERNMENT'S UNIQUE AFFIRMATIVE ACTION OBLIGATIONS UNENFORCEABLE AND HAS MISINTERPRETED THE CONGRESSIONAL INTENT IN ENACTING THOSE STATUTORY OBLIGATIONS.

Congress imposed special affirmative action obligations on federal agencies when it enacted Section 717 of Title VII and incorporated the obligation of the President's Executive Order on affirmative action therein.

The affirmative action obligations of the federal government, unlike that applicable for private employers,[1] are cast in mandatory terms. In Section 717(b) of Title VII, Congress required that each federal department or agency "shall submit" an "affirmative program of equal employment opportunity" which must be approved annually. 42 U.S.C. Section 2000e-16(b). In Section 717(c), Congress expressly incorporated and adopted the affirmative action obligations of Executive Order 11478 as a part of the substantive provisions of Title VII for federal employers and made violations of such obligations actionable in federal court by employees "aggrieved" by such violations. Section 1 of Executive Order 11478 states that "[i]t is the policy of the Government of the United States . . . to promote the full realization of equal employment opportunity through a continuing affirmative program" which "applies to and must be an integral part of *every aspect* of personnel policy and practice in the employment development, advancement and treatment of civilian employees of the Federal Government." (emphasis supplied). Section 2 of E.O. 11478 states that "[t]he head of each executive department and agency *shall* establish and maintain an affirmative action program of equal employment opportunity . . . in accordance with the policy set forth in Section 1" and that such department heads shall also "utilize to the fullest extent the present skills of each employee [and] provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities." E.O. 11478, Section 2.

There is no reason to believe that Congress intended for such affirmative action obligations to be nothing more than an unenforceable curiosity in the statutory scheme. The affirmative action obligations of Section 717 are made actionable in federal court by the language of Section 717(c) which states that complaints "brought pursuant to . . . Executive Order 11478 or any succeeding Executive Orders"

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[1]See *Turner v. Orr*, 759 F.2d 817, 824, n. 2 (11th Cir. 1985) (Congress enacted Section 717 "not only making Title VII applicable to the federal government, but also imposing unique affirmative action obligations on federal agencies.").

may be filed as "a civil action as provided in Section 706 of this title" by an employee "aggrieved by the final disposition of his complaint" at the administrative level. 42 U.S.C. Section 2000e-16(c). In Section 717(d), it states that "[t]he provisions of Section 706(f) through (k) of this Title, as applicable, shall govern civil actions brought hereunder." 42 U.S.C. Section 2000e-16(d). Thus, violations of Section 717 and E.O. 11478 are made actionable under both Section 717(c) and Section 717(d). Jurisdiction is vested in the federal courts over such actions pursuant to the provisions of Section 706(f) which states that "[e]ach United States district court . . . shall have jurisdiction of actions brought under this title." 42 U.S.C. Section 2000e-5(f)(3).[2]

These statutory provisions demonstrate that Congress did not intend to make the federal government's affirmative action obligations unenforceable or discretionary. The Court of Appeals, however, has nullified the Congressional intent by holding that such obligations are purely permissive, not mandatory, and are unenforceable in the federal courts. There is no basis in the language or history of the Act for this result.

The decision of the Court of Appeals creates error of fundamental importance to the statutory scheme of Title VII because it leaves no room for enforcement of the federal government's affirmative action obligations in even the limited circumstances charted by the trial court where: (1) the plaintiff is one of the intended beneficiaries of the defendant's affirmative action obligations; (2) the defendant deliberately chose to violate such obligation by not according the benefits of the plan to the plaintiff; (3) in the absence of the violation of the affirmative action plan the plaintiff would have been selected or retained (i.e., she was just as well qualified and senior to the white male selected or retained);

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[2]In *Eatmon v. Bristol Steel and Iron Works, Inc.*, 769 F.2d 1503, 1508 (11th Cir. 1985), it was held that the "brought under" language of Section 706(f)(3) was *not limited* to the "typical action . . . in which an employee sues his or her employer for the latter's discriminatory practices," but also extends to enforcement of obligations incurred "through conciliation and voluntary compliance" activities regardless of whether there was a prior discriminatory act which prompted such obligations.

and (4) the defendant has not articulated any rationale for not selecting or retaining the plaintiff which overrides the affirmative action plan or which explains the decision on non-discriminatory grounds which are not contradicted or made incredible by the affirmative action plan. Here, the trial court entered findings of fact on each of these issues in favor of the plaintiff and these findings were not reversed by the Court of Appeals as "clearly erroneous."

Contrary to that of the Court of Appeals, the approach adopted by the trial court is a moderate one consistent with the intent of Congress which gives room for enforcement of the government's affirmative action obligations without creating liability for every deviation from such a plan or imposing an unduly rigid obligation on federal agencies to always retain a minority employee over a white male employee. The district court expressly limited its holding to situations where the white male was less senior, no better qualified and, in the absence of the breach of the AAP obligation, would not have been retained. In this situation, sex or race are not the exclusive basis for retaining the minority female protected by the AAP obligation, but are only one among several factors, including the two primary ones of comparative qualifications and seniority. Thus, there is no inflexible or unduly rigid preference for females or minorities which is divorced from qualifications or seniority.

The Court of Appeals' rationale for rejecting liability in this situation is unsound because it erroneously assumes that that Title VII deals only with "discrimination" *per se*. This Court in *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442, 1451-53 & n. 8 (1987), specifically rejected the thesis of Justice Scalia's dissent which called for restricting Title VII solely to "discrimination" without any consideration of the broader purposes of the Act to encourage "voluntary compliance" where there was no past discrimination *per se*, but only an observable imbalance in the workforce. *Id.* at 1465-66, 1469-76. The Court held that affirmative action plans could be used as a "shield" in Title VII cases, without any proof that there was any prior discrimination, because such plans were a part of the "voluntary compliance"

which Congress intended to promote when it enacted Title VII. *Id.* at 1451-53. The decision of the Court of Appeals is contrary to *Johnson* because it depends upon the same narrow view that Title VII only prohibits "discrimination" *per se* which was rejected by six members of this Court in *Johnson*. Without that restricted view of the Act, the rationale of the Court of Appeals unravels.

Other decisions have also recognized the invalidity of the notion that Title VII only addresses discrimination *per se*. In *Eatmon v. Bristol Steel and Iron Works, Inc.*, 769 F.2d 1503 (11th Cir. 1985), the court held that Section 706(f)(3) of Title VII is broader than the "typical action" brought under "Title VII . . . in which an employee sues his or her employer for the latter's discriminatory practices." *Id.* at 1508. The "brought under" language of Section 706(f)(3) was held to also encompass enforcement of agreements voluntarily entered into by an employer without any admission or finding of discrimination *per se*.[3] *Id.* Affirmative action plans by federal departments and agencies are just as much a part of the Congressional scheme of achieving voluntary compliance with the Act as are conciliation agreements of the type held enforceable in *Eatmon*. Indeed, affirmative action plans are even more central to the Congressional enforcement scheme for federal departments than is the conciliation process. There are no sound policy reasons for treating affirmative action obligations different from conciliation agreements or consent decree obligations. See e.g., *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1501 (11th Cir. 1987) *affirmed sub nom., Martin v. Wilks*, 109 S.Ct.

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[3]The defendant employer in *Eatmon* argued that there was no jurisdiction under Title VII because the plaintiffs did not challenge discrimination *per se*, but only sought to enforce an Executive Order conciliation agreement that had been entered without any finding or admission of sex discrimination. *Id.* at 1509-12. The court rejected such argument and held that the terms of the agreement could be enforced directly under Title VII without alleging or proving any "underlying claims of discrimination" because the Act was broader than merely prohibiting discrimination through litigation, but also extended to promoting voluntary efforts to integrate minorities into the mainstream of the American economy and workplace. *Id.* at 1509-12. Accord, *Johnson, supra*, 107 S.Ct. at 1451; *Brewer v. Muscle Shoals Bd. of Ed.*, 790 F.2d 1515, 1519 (11th Cir. 1986).

2180 (1989) ("We perceive no reason for treating a consent decree entered pursuant to a voluntary settlement differently from a voluntary affirmative action plan.").

Both *Eatmon* and *Johnson*, as well as the trial court in the current case, also recognize that it would frustrate the Congressional goal of promoting voluntary employer action if such action, once undertaken, could not be enforced until after any underlying discrimination were admitted or proven. App. 10-12, 16. *Compare Johnson,* 107 S.Ct. at 1451-53 *with Eatmon,* 769 F.2d at 1509-1513. Employees should be allowed to seek enforcement of an affirmative action obligation, once undertaken, because without such enforcement the obligation will become a sham used more as a "shield" by employers from reverse discrimination allegations than a "sword" to undo the effects of a past history of discrimination. App. 10-12, 16. Congress intended that affirmative action obligations be such a sword when it enacted Section 717 of Title VII *for its own federal employees* and when it incorporated the President's similar sword found in Executive Order #11478.

It has been recognized that enforcement of the Act by the victims of violations of its terms is one of the primary means by which Congress intended to foster compliance with the Act. See *Johnson, supra.* The affirmative action process mandated in Section 717(b) and (c) cannot achieve the primary Congressional purpose of "cooperation and voluntary compliance" if employees are not able to enforce such commitments, once made, without first proving the underlying discrimination. The reasons for this are graphically set forth in *Eatmon, supra* at 1512-13. See also, *Brewer v. Muscle Shoals Sch. Bd., supra,* 790 F.2d at 1519. In the vast majority of cases, affirmative action obligations will be respected by employers without resort to litigation, but in the case where the obligation becomes a sham, as the district court found it to be in the current case, there should be a remedy available which does not send the employee back to the very beginning of the compliance process.

Enforcement of the federal government's affirmative action obligations will not create a discentive or "chill" volun-

tary affirmative action. The federal agencies have a *statutory duty* to engage in affirmative action under Section 717 of Title VII and Executive Order #11748 which is incorporated into Section 717 by reference. No further "incentive" is needed. Unlike the case with private employers or state and local governments, Congress and the President have *the right to intrude more directly* on the employment process of federal departments by dictating affirmative action as a part of the employment policy of such departments.[4] That is what has been done in Section 717(b) and (c) and in E.O. 11478. *Morman v. John Hancock Mut. Life Ins. Co.*, 45 F.E.P. Cases 297, 298-299 (E.D. Mich. 1987) (" . . . there is no disincentive to employers who are sincerely committed to establishing equality of employment opportunity and who wish to adopt meaningful AAP's.").

Nor does the trial court's ruling impose automatic or *per se* liability for breach of the affirmative action plan, but simply recognizes that in the absence of a legitimate reason for such breach it is not unreasonable to expect employers to do what they have promised. The Court of Appeals, on the other hand, would make such obligations enforceable only at the unilateral whim of the employer. The district court correctly recognized that the courts need not go to this extreme in order to avoid chilling the adoption of affirmative action plans. The district court has struck a balance between the competing purposes of making affirmative obligations meaningful, and to some degree enforceable, on the one hand, and avoiding the creation of a disincentive to adopt such obligations on the other.

The district court's decision does not insulate minorities or females from lay-off or make their race or sex more than one factor in the mix of information which goes into the layoff decision. It was only when the plaintiff proved that the white male was less senior and no better qualified that the district

---

[4]Even in the absence of the statutory and regulatory duty, there is no discentive or chilling effect from merely expecting employers to abide by their affirmative action obligations *unless* deviation is justified by the credible articulation of better qualifications, more seniority or some other legitimate, non-discriminatory reason.

court held there to be no justification for the departure from the affirmative action obligation. Since the defendant could not articulate any other justification for evasion of the obligation, the district court was correct in finding a violation of Title VII and a breach of contract.

THE COURT BELOW IMPROPERLY USURPED THE FACTFINDING FUNCTION OF THE TRIAL COURT BY RENDERING A DECISION ON A FACTUAL BASIS WHICH THE TRIAL COURT HAD SPECIFICALLY RESERVED.

In *Pullman Standard v. Swint*, 456 U.S. 273, 292 (1982), this Court held that "where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." In this case, the trial court specifically stated that it did not have to reach the factual issues in a traditional disparate treatment Title VII case because of its holding that the defendant's violation of its affirmative action plan was unjustified and illegal under Title VII. The Court of Appeals held that this view of the law was wrong, but did not remand for a factual determination applicable to a traditional disparate treatment case (i.e., whether there was intentional racial or sexual discrimination). Instead, the Court of Appeals decided this factual issue for itself even though it is clear from the opinion of the trial judge who heard the testimony that he was inclined to believe that intentional employment discrimination occurred, although he did not have to reach that issue because of his ruling on the affirmative action violation. App. 15-16. After reading the trial court's factual findings and the evidentiary record, it is impossible to believe that the question of intentional discrimination *vel non* can only be answered in the negative. App. 1-17.

The question of intentional discrimination in a traditional disparate treatment case is primarily one of credibility. In *U.S. Postal Service Bd. of Governors v. Aikens*, 103 S.Ct. 1478, 1482 (1982), this Court reiterated the unique role which the district court plays in the determination of whether an employer has intentionally discriminated against an em-

ployee on the basis of his race. The Court held that the ultimate issue in any disparate treatment case is for "the district court [to] decide which party's explanation of the employer's motivation it believes." *Id.* at 103 S.Ct. (emphasis supplied). See also, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255-256 & n. 10, 101 S.Ct. 1089, 1095 and n. 10, 67 L.Ed.2d 107 (1981).

As such, it is entirely inappropriate for the appellate court to render a verdict in a case in which the trial court has not yet been allowed to engage in the delicate credibility determinations which are at the heart of a Title VII case. There is more than ample evidence to make such determinations necessary in the trial court in this case. Remand should have been ordered as required by *Pullman Standard v. Swint.* Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgment of the Court of Appeals, and remand the case with directions to enter a judgment affirming the order of the district court entered herein on May 6, 1987 and supplemental memorandum opinion and order entered on December 16, 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three true and correct copies of the foregoing Petition For Writ Of Certiorari were served on Mr. Justice M. Schwamm, Sr., Assistant General Counsel, Tennessee Valley Authority, Knoxville, Tennessee 37902; Ms. Lisa J. Stark, Attorney at Law, Department of Justice, P. O. Box 66078, Washington, D.C. 20035-6078; Mr. Kenneth W. Starr, Solicitor General, U. S. Department of Justice, Washington, D.C. 20530; and Mr. Robert E. Williams and Mr. Douglas S. McDowell, Attorneys at Law, 1015 Fifteenth Street, N.W., Suite 1200, Washington, D.C. 20005, by United States mail, first class postage paid, this the ___ day of _____, 1990.

Robert L. Wiggins, Jr.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

CHRISTINA FANG-HUI LIAO,	)	
Plaintiff	)	
VS.	)	CIVIL ACTION NO.
CHARLES H. DEAN, JR., ET AL.,	)	86-AR-5428-NW
Defendants	)	

MEMORANDUM OPINION

Christina Fang-Hui Liao sued the Directors of her former employer, Tennessee Valley Authority, invoking 42 U.S.C. § 2000e, *et. seq.*, claiming that her termination by TVA as a research chemist was the result of racial and/or sexual discrimination. The court heard oral testimony and considered written evidence. The court makes the following findings of fact which bear upon the conclusions of law which it thereafter reaches.

Findings of Pertinent Fact

Dr. Liao is a female citizen of Chinese extraction. She was first employed by TVA on July 7, 1977, as a research scientist in the TVA's National Fertilizer Development Center (NFDC), Soil and Fertilizer Research Branch. When employed she held a Ph.D. in chemistry and was hired as a project co-leader for nitrogen research projects carried out at NFDC. Dr. Liao's entrance pay classification was SD-3, which was lower than the entrance pay classifications of white male Ph.D. research scientists employed before and after she was employed in NFDC. During her time of employment, Dr. Liao lodged written and verbal complaints with her supervisors alleging disparate treatment in several respects: (1) slow promotion and unfair differentiation in job classification; (2) lack of an exclusive laboratory and a laboratory assistant; (3) unfair performance evaluations; (4) non-exposure to educational seminars and advancement opportunities; and (5) ostracism. A good argument can be made

that one or more of Dr. Liao's pre-termination complaints was valid; but the court finds it unnecessary to decide whether or not anything Dr. Liao complained of prior to her termination constituted an act motivated by sexual and/or racial discrimination, that is, except to the extent that her complaints may tend to reflect an adverse white male reaction to TVA's affirmative action program (AAP), which will be the primary subject of this opinion.

Dr. Liao's complaint arises from her termination in a reduction in force (RIF) which took place on January 8, 1982. She was chosen as the only employee in the Soil and Fertilizer Branch to be involuntarily terminated in the RIF. Dr. Bert Bock, a white male with two years less seniority than Dr. Liao, was retained. This court has no doubt that Dr. Liao's original employment with TVA was due in large measure to TVA's AAP, which had been put in place shortly prior to her recruitment. How wonderful it was to have signed up a highly qualified Ph.D. who was also Asian and female. TVA's AAP, sometimes referred to as an "Equal Opportunity Plan of Action," was revised, contains several very revealing provisions, not the least of which is the self-criticism reflected in the statistics, clearly showing that women and minority TVA employees at the higher levels were and are not representative of their relative numbers in the work force generally. Another important provision, which is contained in any serious AAP, asserts the goal of attaining an increased and more nearly represntative percentage of the underrepresented groups in the employer's work force. The court has read and considered TVA's entire AAP, together with certain collateral directives involving it. The court finds it unnecessary to repeat all of the affirmative action language, but does suggest that the following have particular significance:

> As shown in Table 2, there is limited participation by women and no participation by blacks in the management schedule. The reasons are the same for both women and blacks. The vast majority of management positions in the division represents project leaders in the areas of soil science, agron-

omy, economics, biological sciences, or engineering. Most have "advanced degrees" in these technical fields and/or proven competence in these fields. Their classification as management reflects the past de facto recognition of the dual ladder concept rather than the supervisory concept need in many TVA organizations; hence, scientific or technical training, experience, and competence are major criteria. Very few women and blacks are pursuing advanced degrees in the agricultural sciences and engineering. Those who do are very actively recruited by industry, universities, and other government agencies. The combination of scarcity and demand has made it virtually impossible to date to recruit and retain qualified women and/or black employees in these project leader positions. We feel that participation by women in the other occupational classes is either in balance or made adequate progress during the reporting period. [because of Dr. Liao's employment?]

* * *

There is a significant disparity in the proportion of both women and blacks in lower level positions as compared with all employees. Both women and blacks are overrepresented in lower level positions.

* * *

There is a wide disparity between the proportion of women and blacks in upper grade levels and that of the total employment.

* * *

Soils and Fertilizer Research Branch — Special recruitment efforts were made during this reporting period to find qualified women or minorities to fill two positions as research soil chemists. The first position (SD-4) requires Ph.D.-level training and experience in transformatoins of soil and fertilizer nitrogen and proven ability to perform independent research. Repeated contacts with a number of land-grant universities and personal contacts with established researchers and graduate professors yielded no minority or women candidates and only two qualified white male applicants. An offer was

made one of the applicants, and he has accepted employment beginning October 1979.

* * *

A woman of Asian origin [Dr. Liao] was reclassified from Research Chemist, SD-3, to SD-4.

* * *

In the M Schedule [Dr. Bock is an M-5] professional categories the division is underrepresented in all protected class groups. In the SD schedule professional categories we have severe underrepresentation in all protected class groups with the exception of white and black females at the SD-1 level and black males at the SD-2 level. [Dr. Liao was an SD-4 at the time of her termination].

* * *

For Managers/Administrative, the internal work force has been our primary source. Since only white males occupied all of these positions, it is obvious that other sources should have been used more extensively.

* * *

[F]or most of the professional position vacancies, we have had no applicants from the protected class groups. This points up again our need to intensify our recruitment efforts for candidates from the protected class groups at all levels so that we will have a readily available pool of qualified applicants to draw upon.

* * *

[A]s pointed out earlier, in the occupations of Managers/Administrative and Life/Physical Scientists (both on the M schedule and the SD schedule), we had only white male applicants, which emphasizes again our need for more intensive and extensive recruitment efforts.

* * *

One Asian American female [Dr. Liao] was employed in this occupation during this period and received a promotion in FY 1979 . . .

* * *

Unfortunately, immediate vacancies for critical positions are difficult to hold for long-term re-

> cruitment or training strategy. Better planning and knowledge of minority opportunities are essential for corrective measures.
>
> * * *
>
> The division goals are ambitious. All 11 vacancies are targeted to be filled with women or minorities. Our AAP is structured so as to identify applicant pools and overcome recruitment barriers to the extent possible for both internal and external sources. Recruitment strategies include a concerted effort to recruit and promote from within the division and TVA as well as extensive effort from the civilian labor force.
>
> We anticipate that we will have to spend an inordinate amount of time recruiting Hispanics, Asian Americans, and American Indians. We expect more contact with organizations representing these groups along with more assistance from the Office of Personnel; however, we are confident that our hiring goals are achievable if budgets and manpower ceilings permit.

In a memorandum to all TVA employees dated May 24, 1979, the TVA chairman said:

> Employees who have managerial or supervisory oversight of any kind have a special obligation to aggressively carry out TVA's policy on equal employment opportunity. You are expected to vigorously support all affirmative action programs designed to eliminate the present effects of past discrimination and to make sure all employment decisions are free from prohibited discrimination.

When budgetary constraints were imposed by the Government, a communication was received by TVA from the Office of Personnel Management under date of June 5, 1981. It said, *inter alia:*

> In line with the President's commitment to reduce the level of Government spending and thereby help restore the vitality of the nation's economy, most of you will be operating under budget restrictions and

> reduced personnel ceiling levels during the next few years.
>
> * * *
>
> For those agencies faced with a reduction-in-force, it is important to bear in mind the potential impact on veterans, handicapped, minority and female employees. In addition, agencies which will be hiring new personnel should consider using reemployment priority lists established by other agencies which have been subject to RIFs. Because of a tendency toward a "last hired, first fired" effect of RIF procedures, veterans, handicapped, minorities and women employed recently as a result of previous affirmative action efforts may be well represented on such lists. Of course, agencies are not excused from RIF laws and regulations when they make such considerations.

TVA's Director of Equal Opportunity Compliance circulated internally this communication with an accompanying memorandum entitled "Affirmative Action Efforts During Reduced Employment Period". It was graphic in its import.

With the foregoing language having been unilaterally adopted by TVA and disseminated to its employees, along came budget cutting time in 1981. This necessarily meant that there would be a RIF, which, in turn, meant that TVA and Dr. Liao's department in it had to make decisions as to which employees to keep and which employees to cut. Dr. Liao's department, with TVA's Personnel Department concurring, decided to terminate one SD-4 level job position. This was a euphemistic way of deciding to terminate Dr. Liao, because the description fit Dr. Liao and no other. It neatly avoided the termination of the M-5 level white male research chemist, Dr. Bock, who was employed two years after Dr. Liao.

It is unnecessary to this decision for the court to determine whether or not Dr. Bock was given his promotion to M-5 in anticipation of a possible future RIF so that in such an unhappy event a seemingly logical distinction could be made between an M-5 and an SD-4. Such an anticipatory decision would constitute an act of disparate treatment at the time it

was made, if such were its purpose. It is certainly true that if Dr. Liao had been designated M-5, as perhaps she should have been, it would have been impossible to diguise the decision to prefer Dr. Bock over Dr. Liao during the RIF. TVA attempted to frame its RIF decision in objective terms. The discussions which led to the decision make it obvious that the idea was to eliminate Dr. Liao, the only SD-4 in the department. The choice for termination was clearly between Dr. Liao and Dr. Bock, and not between job classifications. Therefore, the decision was both subjective and in violation of the express provisions of the AAP, as well as in violation of the philosophy and purpose of affirmative action plans in general. The RIF decision may have had a rational basis in that the alleged weaknesses and strengths of Dr. Liao and Dr. Bock were discussed by the decision-makers. If the fear of the AAP did not dominate these discussions, it pervaded the process and was an occasion for some consternation by the decision-makers. Although Dr. Laio and Dr. Bock were not performing precisely the same work, their work was substantially similar, and their academic qualifications were virtually identical. The only real distinction between them was that their supervisors liked Dr. Bock better than they liked Dr. Liao. A comparison of their respective personalities definitely played a large part in the decision. Of course, there can be no more subjective criterion for an employment decision than "personality".

Although the RIF decision attempted to pay lip service to the AAP, TVA failed fully to anticipate the legal significance of its AAP, and by not having understood that significance, made a choice to discharge a qualified Asian woman while keeping a qualified white male with two years less service, a decision which further skewed an already admittedly badly imbalanced scientific work force as to both race and sex.

Conclusions of Law

The court has jurisdiction over this controversy pursuant to 28 U.S.C. §§ 1331 and 1342 and 42 U.S.C. § 20003-16(c).

As far as this court has been able to ascertain, this is a case of first impression. It asks this question: Can an employer

use its voluntary, unilateral affirmative action program as a *shield* against claims of reverse discrimination without also allowing its employees to use the program as a *sword* to enforce their rights as employees with a preferred status? Dr. Liao asks this court to take the next, easy, logical step suggested by *Johnson v. Transportation Agency*, ___ U.S. ___, 107 S.Ct. 1442 (1987), decided March 25, 1987.

If this court had been asked in a case of first impression to decide the question which was presented to the Supreme Court in *Johnson v. Transportation Agency*, this court would have reached the conclusion which Chief Justice Rehnquist and Justices Scalia and White reached in dissent, although undoubtedly without Justice Scalia's eloquent way of expressing it. But this court, while not always in philosophical agreement with the Supreme Court, learned early how to count. This court quickly recognizes that six beats three by a healthy margin. In *Johnson v. Transportation Agency*, the Court was dealing with a public employer whose unilaterally adopted AAP not only expressly permitted but encouraged employment decision-making that took into account race and sex. The avowed purpose of the AAP was to achieve a work force more representative of the sex and race of the working community. The court of appeals in *Johnson v. Transportation Agency* had recognized that the AAP there had been adopted to address a conspicuous imbalance in the Transportation Agency's work force. The similarities between the AAP adopted by Transportation Agency and the AAP adopted by TVA are impressive. In *Johnson v. Transportation Agency*, the Supreme Cout says:

> The Plan noted that this underrepresentation of women in part relfected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them "because of the limited opportunities that have existed in the past for them to work in such classifications." [citation omitted] The Plan also observed that, while the proportion of ethnic minorities in the Agency as a whole exceeded the proportion of such minorities in the county work force, a smaller percentage of

> minority employees held management, professional, and technical positions. [footnote omitted].
>
> The Agency stated that its Plan was intended to achieve a "statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job clasisfications where they are underrepresented." [citation omitted]. As a benchmark by which to evaluate progress, the Agency stated that its long-term goal was to attain a work force whose composition reflected the proportion of minorities and women in the area labor force. [citation omitted].

107 S.Ct. at 1446-47.

This description reflects TVA's stated purpose for its AAP. The Court, after discussing the AAP itself, goes forward to explain that *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721 (1979), "was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the work place. . . . " 107 S.Ct. at 1451. As is true in Dr. Liao's case against TVA, the Court says of Transportation Agency's AAP: "For positions requiring specialized training and experience, the Plan observed that the number of minorities and women 'who possess the qualifications required for entry into such job classifications is limited' ". *Id.* at 1454. The Court next says: "From the outset, therefore, the Plan sought annually to develop even more refined measures of the underrepresentation in each job category that required attention". *Id.* at 1454. Finally, the Court concludes: " . . . the Agency's Plan was intended to *attain* a balanced work force, not to maintain one." *Id.* at 1456 (emphasis in original). While Transportation Agency's AAP did not expressly provide for "quotas" and attempted to maintain some flexibility, it had the earmarks of an internal mandate, just as TVA's AAP does.

In the context of conflicts like this one, this court can detect no rational distinction between a consent decree to which certain employees and the employer are privy and an

AAP adopted for the express benefit of certain employees. If an employee who is granted a preferred status by court decree can enforce that judicially mandated preference, why should not the beneficiary of an AAP be able to do the same?

Predicting that a case like Dr. Liao's case would come along, and even inviting it, Justice Stevens in his concurring opinion uses the "shield and sword" analogy in this clear language:

> While I join the Court's opinion, I write separately to explain my view of this case's position in our evolving antidiscrimination law and to emphasize that the opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantage groups.
>
> Antidiscrimination measures may benefit protected groups in two distinct ways. As a sword, such measures may confer benefits by specifying that a person's meambership in a disadvantaged group must be a neutral, irrelevant factor in governmental or private decisionmaking or, alternatively, by compelling decisionmakers to give favorable consideration to disadvantaged group status. As a shield, an antidiscrimination statute can also help a member of a protected class by assuring decisionmakers in some instances that, when they elect for good reasons of their own to grant a preference of some sort to a minority citizen, they will not violate the law.

107 S.Ct. at 1457-58.

* * *

> It remains clear that the Act [Title VII] does not *require* any employer to grant preferential treatment on the basis of race or gender, but since 1978 the Court has unambiguously interpreted the statute to *permit* the voluntary adoption of special programs to benefit members of the minority groups for whose protection the statute was enacted.

107 S.Ct. at 1458-59 (emphasis by Justice Stevens).

Once the employer is *permitted* voluntarily to adopt an AAP "to benefit members of the minority groups for whose protection the statute was enacted", the employer is then

required to adhere to its own program. Otherwise, the adoption of an AAP would be meaningless. This court finds that by adopting its AAP for the avowed purpose of attaining a more balanced work force, Dr. Liao's employer not only succeeded in insulating itself from most complaints of reverse discrimination but placed in the hands of Dr. Liao and other protected employees a Title VII sword they would not otherwise have been able to wield. Defendants here cannot use their own self-mandate when convenient and ignore it when they find it bothersome. To allow an employer, particularly a public employer, that brags in its own AAP materials about having hired and promoted its only Asian female Ph.D., to shelve its AAP when RIF time arrives, would be to encourage an hypocrisy which Justice Stevens and the other members of the majority in *Johnson v. Transportation Agency* could not tolerate. Unless the Supreme Court some day decides to rethink the whole concept of affirmative action as a tool for achieving employment equity, this tool seems to be permanently available, because the perfect society is not yet in sight.

TVA's argument would have more merit if Dr. Bock had been retained because of *seniority*, even though this AAP contains no exceptions in recognition of seniority. As recognized in *Britton v. South Bend Community School Corp.*, 775 F.2d 794 (7th Cir. 1985), a "no minority layoff" provision in a collective bargaining agreement is valid as against an attack by those whose seniority rights are adversely affected. This holding is similar to the holding in *Sisco v. J. S. Alberici Construction Co., Inc.*, 655 F.2d 146 (8th Cir. 1981, *cert. denied*, 455 U.S. 976 (1982)), which approved the retention of blacks pursuant to an AAP during a RIF in order not to worsen the employees' racial mix. An enlightening expression of the same concept is found in *Vulcan Pioneers v. New Jersey Dept. of Civil Service*, 588 F. Supp. 716 (D. N.J. 1984), as follows:

> The court . . . is convinced that adherence to strict contractual and statutory seniority requirements in determining who shall go and who shall stay cannot be permitted. The affirmative action plan embodied

> in the consent decree between the parties and the hirings pursuant thereto would be substantially eradicated thereby. The gains contemplated and those achieved would be lost.

588 F. Supp. at 717-18.

These three opinioins, and Supreme Court opinions like them, are *inversely* applicable in Dr. Liao's case, because TVA cannot, and therefore does not, attempt to justify its RIF decision in terms of seniority. The only reason the court mentions this line of cases is to indicate that there is no necessity in the instant case for this court to agree or to disagree with them. They simply have no direct application.

In their post-trial brief, defendants seek to limit the inquiry to the question of whether or not "plaintiff has shown that the reasons for the RIF and the elimination of her position were pretextual". They correctly point out that the Merit Systems Protection Board, during Dr. Liao's exhaustion of remedies, recognized the following undisputed facts:

> The parties have stipulated to the fact that [Dr. Liao] has established a prima facie case of discrimination.
>
> And, also, that [TVA] has established a legitimate non-discriminatory reason for taking the [RIF] action.

Defendants pass over very lightly the implications in this case of TVA's AAP. The following contains everything which defendants say on the subject in their brief:

> The Court has directed the parties to address the issue of the role of affirmative action in the RIF here. Under the evidence, TVA's affirmative action program cannot be used to satisfy plaintiff's burden of proof.
>
> In simplest terms, there is a failure of proof. None of the evidence on affirmative action with Agricultural Development provides for using affirmative action considerations to reverse a decision to eliminate a position through RIF. A. R. 780-800.

> As Mr. Shields testified, he was concerned about the affirmative action effect of eliminating plaintiff's position but could not use that concern to reverse Dr. Sample's recommendation of where SFRB could take a cut and still preserve high priority work in the nitrogen area.
>
> Even if there was some proof on this point, the Supreme Court in *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986), and in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), indicated that it was not appropriate for an employer to favor a member of one racially identifiable group over a member of another in a layoff situation. 106 S. Ct. at 1847-58; 467 U.S. at 577-83. Accordingly, if Dr. Sample had determined that plaintiff's position should be eliminated, but that a white project leader's position would be eliminated instead due solely to plaintiff's race, TVA would have been on very shaky legal ground.

Noticeably absent from the defendants' brief is any reference whatsoever to *Johnson v. Transportation Agency*. This very recent decision of the Supreme Court cannot be swept under the rug.

To fire Dr. Liao and to keep Dr. Bock, who was hired two years after Dr. Liao, can hardly be said to enhance TVA's future prospects for recruiting technically qualified females and racial minorities. The whole rationale for TVA's AAP is frustrated and made into a sham unless Dr. Liao is given the benefit of the doubt during a RIF. In this instance, TVA was perfectly aware of its AAP requirements and yet made a decision without in any way giving Dr. Liao the preferential consideration she was due under the AAP. An employer simply cannot be allowed to advertise itself as an affirmative action employer and then wink at its AAP when it gets in the way.

Because the decision to RIF Dr. Liao instead of Dr. Bock was a clear violation of the employer's AAP, there is no good purpose to be served in going through the analysis which defendants insist upon, and outlined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089

(1981). The *Burdine* analysis would be difficult, if not impossible, in this case. TVA had formally undertaken an *affirmative action obligation* to Dr. Liao. Given the added weight of this preference, there is no logical or fair way that TVA, or this court, can justify TVA's decision to terminate Dr. Liao while retaining Dr. Bock. Under the logical next step from *Johnson v. Transportation Agency*, there is no need for this court to determine whether or not TVA's decision to terminate Dr. Liao was impermissibly or directly motivated by her race and/or her sex. She was entitled to reverse, reverse discrimination.

This court does not mean to be understood as holding that there can never be a circumstance in which a person enjoying a preferred status under an AAP cannot be displaced or differentially treated in competition with another, substantially better qualified, non-protected employee. This court can easily conceive of a scenario where an affirmatively preferred person, according to the AAP, could be sufficiently inferior in qualifications to a non-preferred person as to create an excuse for not strictly applying the AAP. But this is not that case. Dr. Liao is admittedly a good chemist. She was dedicated to her job. Her performance level was recognized as more than adequate by her superiors until the RIF appeared imminent. It was at that time that her alleged shortcomings were aired, for the purpose, whether covert or overt, of providing an escape from the AAP mandate.

To end on a trite but serious note, TVA is hoist on its own petard, as many other employers soon may be.

By separate decree, Dr. Liao will be reinstated with back pay.

DONE this 6th day of May, 1987.

/s/ William M. Acker, Jr.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

CHRISTINA FANG-HUI LIAO,	)	
	)	
Plaintiff-Appellee	)	
	)	
VS.	)	CIVIL ACTION NO.
	)	
TENNESSEE VALLEY AUTHORITY, ET AL.,	)	86-AR-5428-NW
	)	
	)	
Defendants-Appellants	)	

SUPPLEMENTAL MEMORANDUM OPINION
AND ORDER

Plaintiff-appellee, Christina Fang-Hui Liao, has filed a motion invoking Rule 10(e), F.R.A.P., seeking a clarification of the opinion and order of this court from which defendants-appellants, Charles Dean, et al., have appealed. The motion presents a matter or matters which, in this court's opinion, do fall within those contemplated by Rule 10(e), and the motion therefore will be granted to a considerable extent. When the parties so obviously differ in their respective understandings of important features of this court's opinion, this court is compelled, to the extent possible, to remove the enigma and to make itself clear so that the parties and the Court of Appeals will clearly understand what this court was trying to convey.

This court fully acknowledges that it was remiss in relying too much on the "implicit" and not enough on the "explicit" and as a result may not have fully complied with the instruction of *Ferguson v. Veterans' Administration*, 723 F.2d 871, 872 (11th Cir. 1984).

By this opinion and order of clarification, this court hopes to make unequivocal its finding both of intentional racial and of intentional sexual discrimination by defendants when Dr. Liao was terminated contrary to the mandate and purpose of

the AAP promulgated by defendants. Not only did Dr. Liao present the classic *prima facie* case under the so-called *Burdine* analysis, because of her race (Chinese), and her sex (female), and her admitted qualifications (Ph.D. chemist with no record of disciplinary action), and her termination in favor of a male Caucasian, but the allegedly legitimate non-discriminatory reason articulated by defendants is automatically and by definition "pretextual," because it was in clear violation of the AAP and not justifiable in terms of any intervening or overriding principle of "seniority." This court did not decide, and did not need to decide, that Dr. Liao is *better* qualified than Dr. Bock. The undisputed fact is that she was *qualified.* She was Chinese. She was female. She therefore enjoyed a preference under the terms of the AAP, which, in legal and practical effect, acted as a confession of the requisite discriminatory motive when it was violated by defendants. The voluntary adoption of the AAP placed on the employer a higher standard for articulating a legitimate non-discriminatory reason than if no AAP had existed. This is admittedly a somewhat new concept, but it is one which this court believes to represent the current state of the Supreme Court law. Defendants did not meet this standard.

Also intended by the court in its earlier opinion, but apparently not well expressed, is this court's belief and finding that an employee who is employed after the adoption of an AAP by his or her employer, and who accepts employment with no reason to believe that the employer does not intend to comply with the AAP, which by its terms provides benefits peculiar to that employee (as in Dr. Liao's case), the AAP becomes, in effect, a contractual obligation by the employer in favor of the thus affirmatively preferred employee. This court felt and feels that Title VII is broad enough in its intent and purpose to permit such a contractual obligation to be enforced *so long as consistent with and not repugnant to the intent and purpose of Title VII.* Under the Supreme Court doctrine legitimizing affirmative action programs which do not contain rigid racial quotas, this AAP is neither repugnant to nor inconsistent with Title VII.

The fact that the EEOC never was asked by Dr. Liao to pass upon the legal effect of this particular AAP, either under the *Burdine* analysis, or as a principle of contract law consistent with Title VII, did not prevent this court from addressing these issues at trial, even though apparently the court inartfully addressed them.

Whether the discussion of the effect of the AAP in this case constituted a finding of "disparate treatment," or a finding of "disparate impact," or a finding of both, is not, in this court's opinion, a matter for legitimate debate under Rule 10(e). This court feels that it clearly revealed its mind in this regard. It only found the existence of "disparate treatment." If "disparate impact" had been urged and argued by Dr. Liao, the court does not know what it would have done. As this court now recalls the pleadings and pre-trial order, without having them any longer available, Dr. Liao's theory was limited to "disparate treatment," and that is what the court found.

To the extent that there is any conflict or misunderstanding as to this court's intention respecting plaintiff's pre-termination claims, this court, right or wrong, intended not to grant plaintiff any relief for any alleged pre-termination discrimination. The court found pre-termination *smoke* but no pre-termination *fire*. The actual fire did not break out until Dr. Liao's termination and Dr. Bock's simultaneous retention. The court did not intend to retain or to reserve ruling upon Dr. Liao's pre-termination claims but rather to deny them. The court does not recall, and therefore cannot provide clarification on, the subject of any ruling respecting the defense of statute of limitations or the counterdefense of waiver as these concepts may apply to Dr. Liao's pre-termination claims. In fact, if the court denied the pre-termination claims on their merits, as the court intended to do, the questions of waiver and statute of limitations were moot.

The Rule 10(e) motion is partially GRANTED and partially DENIED to the extent set forth in the above opinion, and the opinion and order of May 6, 1987, is hereby thus SUPPLEMENTED and CLARIFIED.

The Clerk is instructed to transmit a copy of plaintiff-appellee's Rule 10(e) motion and of this opinion and order to the Clerk of the Court of Appeals for the Eleventh Circuit.

DONE and ORDERED this 16th day of December, 1987.

/s/ William M. Acker, Jr.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7379

D.C. Docket No. 86-5428

CHRISTINA FANG-HUI LIAO,

Plaintiff-Appellee,

versus

TENNESSEE VALLEY AUTHORITY, et al.,

Defendants,

CHARLES H. DEAN, JR., in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority; JOHN B. WATERS, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Alabama

Before RONEY, Chief Judge, JOHNSON and SMITH*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED and RENDERED;

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Entered: March 16, 1989
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: OCT. 10, 1989

Christina Fang-Hui LIAO,
Plaintiff-Appellee,

v.

TENNESSEE VALLEY AUTHORITY, et al.,
Defendants,

Charles H. Dean, Jr., in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority; John B. Waters, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority, Defendants-Appellants.

No. 87-7379

United States Court of Appeals,
Eleventh Circuit.

March 16, 1989.

Asian female chemist brought action against former employer, Tennessee Valley Authority, under Title VII, claiming that her termination was result of racial and/or sexual discrimination. The United States District Court for the Northern District of Alabama, 658 F. Supp. 1554, No. CV-86AR5428, William M. Acker, Jr., J., rendered judgment for chemist, and employer appealed. The Court of Appeals, Roney, Chief Judge, held that employer's violation of its voluntarily adopted affirmative action plan did not automatically violate Title VII.

Reversed and rendered.

Appeal from United States District Court for Northern District of Alabama.

Before RONEY, Chief Judge,
JOHNSON and SMITH*, Circuit Judges.

RONEY, Chief Judge:

In this employment discrimination case, the district court held that an employer who violates a voluntarily adopted affirmative action plan automatically violates Title VII's prohibitions as well. We reverse.

The Tennessee Valley Authority hired plaintiff Christina Fang-Hui Liao, a woman of Chinese descent, in July 1977, as a research chemist in the Soil and Fertilizer Research Branch of TVA's National Fertilizer Development Center. At the time of her employment, Liao held a Ph.D. in Agricultural Science and had five years experience in the field. Liao's entrance classification was SD-3, although at the time of her termination she had been reclassified to the higher position of SD-4.

Shortly before she was hired, TVA had adopted an affirmative action plan (AAP) which governed the branch for which Liao worked. The plan, dealt with at some length in the district court opinion of May 6, 1987, 658 F.Supp. 1554, recognized the "limited participation" by women and blacks in management and in the scientific and engineering occupations. The plan identified "ambitious" goals and stated that:

> [a] 11 vacanices are targeted to be filled with women or minorities. Our AAP is structured so as to identify applicant pools and overcome recruitment barriers to the extent possible for both internal and external sources. Recruitment strategies include a concerted effort to recruit and promote from within the division and TVA as well as extensive effort from the civilian labor force.

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*Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

The plan identified numerical goals for hiring minorities and women in "targeted occupations" but also noted that the underrepresentation was due to the fact that "[v]ery few women and blacks are pursuing advanced degrees in the agricultural sciences and engineering." The plan did not contain provisions governing procedures to be followed during any cutbacks in staff size.

In 1981, due to budget cuts, TVA began preparing for a reduction in force (RIF). A communication from the Office of Personnel Management admonished TVA to consider the impact that a reduction in force would have on "veterans, handicapped, minority and female employees" who, because they are often the most recently hired under newly adopted affirmative action programs, become the first to be let go when reductions in force are implemented on a seniority basis.

Dr. Liao was fired from the Soil and Fertilizer Research Branch as a result of this reduction in force. She filed a charge of sex and race discrimination with TVA's internal Equal Employment Opportunity office. The examiner found that Liao had established an inference of discrimination by showing that she was a member of two protected classes, that she was reasonably performing her duties, that she was fired during a reduction in force and that others not in her protected class were not fired. The employer's position, both in the EEOC proceedings and in the district court, was that Dr. Eugene Sample, Chief of the Soil and Fertilizer Research Branch, was told that in making cuts, he was to eliminate an entire area of research, if possible, and he was to attempt to continue high-priority projects. Only the nitrogen research — in which Liao was one of three project leaders — could withstand a cut and the other two projects leaders had more broad-based expertise than Liao.

Although not addressing pretext, the examiner concluded, however, that the TVA's reasons for terminating her were non-discriminatory and legitimate. These findings were adopted by the EEO office and upheld on review by the Merit Systems Protection Board and the Equal Employment Opportunity Commission.

Liao then filed suit in federal district court for the Northern District of Alabama alleging that her termination was motivated by sex and in retaliation for her several complaints about alleged discriminatory practices at the TVA.

After a bench trial, the district court on May 6, 1987, entered its order finding that the TVA had violated its affirmative action plan in dismissing Liao and consequently, had violated Title VII. The court, relying on *Johnson v. Transportation Agency*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), found that an employer is required to adhere to its affirmative action plan even though it was adopted voluntarily and without any admission of a past history of discrimination.

We note that the issue of whether the affirmative action plan was violated here was much disputed. The defendants argue that the plan addressed only *hiring* preferences, not *termination* preferences. In any event, plaintiff contends, Title VII creates a statutory affirmative action obligation on federal departments and agencies which applies to both hiring and termination, regardless of the specific provisions of any particular plan. We need not resolve this dispute because even if the affirmative action plan did create an implied obligation to give protection to minorities and women in termination decisions as well as in hiring and promotion, its violation alone is not enough to trigger a Title VII violation.

Johnson does not require otherwise. In that case, the Supreme Court dealt with the issue of whether an affirmative action program which allowed sex and race to be taken into account when making employment decisions, in the particular case whether a qualified woman could be hired in preference to perhaps a marginally better qualified white male, violated the strictures of Title VII. The Court held that such considerations were permissible, quoting its earlier decision in *Steelworkers v. Weber*, 443 U.S. 193, 204, 99 S.Ct. 2721, 2728, 61 L.Ed.2d 480 (1979) in which it stated:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had

> 'been excluded from the American dream for so long' . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy (citations omitted).

Johnson, 480 U.S. at 628-29, 107 S.Ct. at 1450.

In *Weber*, the Court upheld an affirmative action plan which specified that 50 percent of trainees for a newly established craft program were to be black because considering race in hiring goals was consistent with Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy." 443 U.S. at 208, 99 S.Ct. at 2730. Thus, *Weber* and *Johnson* both *permit* the TVA to follow an affirmative action plan which targets the hiring of women and minorities.

These cases do not hold, however, that such preferences are mandatory or that once an employer undertakes a voluntary plan it will be liable for a Title VII violation for every deviation. The Supreme Court simply held that Title VII allows for voluntary affirmative action that is "moderate" and "flexible" and which addresses a gradual improvement in the representation of minorities and women in the workforce, instead of strict numerical goals. 480 U.S. at 642, 107 S.Ct. at 1457-58. It did not, and it could not consistent with Title VII, order that these individuals be given preferential treatment in every case. As Justice Stevens wrote in his concurring opinion:

> It remains clear that the Act [Title VII] does not *require* any employer to grant preferential treatment on the basis of race or gender, but since 1978 the Court has unambiguously interpreted the statute to *permit* the voluntary adoption of special programs to benefit members of the minority groups for whose protection the statute was enacted.

Id. at 644, 107 S.Ct. at 1458-59.

Instead, the Court stressed that the plan in *Johnson* "earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified

applicants for a position." *Id.* at 641, 107 S.Ct. at 1457. Women applicants had to compete with other applicants. "*No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Id.* at 638, 107 S.Ct. at 1455.

Thus, while the TVA's affirmative action plan is permissible under *Johnson*, it is not mandatory, and the failure to give a preference under such a plan cannot be used to support an allegation of discrimination in employment decisions. The caselaw in this Circuit leads to this result. In *Ferguson v. Veterans Admin.*, 723 F.2d 871 (11th Cir.), *cert. denied sub nom. Ferguson v. Walters*, 469 U.S. 1072, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984), this Court held that failure to follow an affirmative action plan in training an individual for a job as a librarian did not violate Title VII. Adopting the reasoning of the Fourth Circuit in *Page v. Bolger*, 645 F.2d 227 (4th Cir.) (*en banc*), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981), this Court determined that "absent a showing of discrimination, there is no Title VII cause of action for the failure to implement or utilize an affirmative action program." 723 F.2d at 872. Rather, Title VII requires a showing of either disparate treatment of an individual in comparison with other employees, or disparate impact of employment practices upon protected groups of employees, or both. *Eastland v. Tennessee Valley Authority*, 704 F.2d 613, 618 (11th Cir.), *modified by* 714 F.2d 1066 (11th Cir. 1983), *cert. denied sub nom. James v. Tennessee Valley Authority*, 465 U.S. 1066, 104 S.Ct. 1415, 79 L.Ed.2d 741 (1984). *See also Gilchrist v. Bolger*, 733 F.2d 1551 (11th Cir. 1984).

Liao argues that the district court did find that she was the victim of disparate treatment in accordance with *Ferguson*. She contends that because the court stated in its initial opinion that it was concerned with whether the TVA conduct "reflects an adverse white male reaction to TVA's affirmative action program," the issue was framed as whether intentional discrimination or disparate treatment had occurred. By also "finding" that Dr. Bock was not as qualified as Liao, she argues, the district court also rejected the TVA's justification

as pretextual. A pretextual reason is the equivalent of a finding of intentional discrimination, Liao concludes.

The district court's May 6 opinion states, however, that because of its interpretation of the mandate of *Johnson*, "there is no need for this court to determine whether or not TVA's decision to terminate Dr. Liao was impermissibly or directly motivated by her race and/or her sex." This clearly shows that the district court equated a violation of the affirmative action plan with a violation of Title VII and thought it unnecessary to engage in an analysis of whether intentional discrimination had occurred.

The district court's supplemental opinion of December 16, 1987, does not change the result. Nearly six months after the appeal was filed, Liao asked the district court on December 14 for a "clarification of findings of fact pursuant to Fed.R.App.P. 10(e)." The order was issued two days later.

The supplemental opinion issued in this case does not fall within Rule 10(e) which provides that "[i]f anything material to either party is omitted from the record by error or accident or is misstated therein . . . he district court . . . may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted." The rule contemplates correction of a record to reflect what occurred below; it does not permit a new or different record to be created. *See, e.g., United States v. Johnson*, 713 F.2d 633, 648 (11th Cir. 1983), *cert. denied sub nom. Wilkins v. United States*, 465 U.S. 1081, 104 S.Ct. 1447, 79 L.Ed.2d 766 (1984); *United States v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1981), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed.2d 136 (1982); *Anthony v. United States*, 667 F.2d 870, 875 (10th Cir. 1981), *cert. denied*, 457 U.S. 1133, 102 S.Ct. 2959, 73 L.Ed.2d 1350 (1982).

Even if the supplemental opinion was proper under Rule 10(e), it remains clear to this Court that the crux of the later opinion was still the failure of the employer to follow the affirmative action plan. The district court wrote that "Liao was terminated contrary to the mandate and purpose of the AAP promulgated by defendants. . . . [T]he allegedly legiti-

mate non-discriminatory reason articulated by defendants is automatically and by definition 'pretextual,' because it was in clear violation of the AAP and not justifiable in terms of any intervening or overriding principle of 'seniority'."

Since a violation of the affirmative action plan cannot serve as the basis for a Title VII violation, and the evidence would not support a finding that the defendant had otherwise violated the provisions of Title VII, the defendant was entitled to judgment as a matter of law.

REVERSED and RENDERED.

UNITED STATES COURT OF APPEALS ORDER OF SEPTEMBER 29, 1989 DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-7379

CHRISTINA FANG-HUI LIAO,

Plaintiff-Appellee,

versus

CHARLES H. DEAN, JR., in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority; JOHN B. Waters, in his official capacity as a member of the Board of Directors of the Tennessee Valley Authority,

Defendants-Appellants

Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC
(Opinion MARCH 16, 1969, 11 Cir., 198__, ___ F.2d ___)
(September 29, 1989)

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and SMITH*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges

who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney

United States Circuit Judge

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*Honorable Edward S. Smith, Senior Circuit Judge for the Federal Circuit, sitting by designation.